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No. 80-1346

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, *et al.*,
Petitioners,

v.

FEDERAL MARITIME COMMISSION AND THE UNITED STATES OF AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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REPLY BRIEF OF PETITIONERS TRANS-PACIFIC FREIGHT CONFERENCE OF JAPAN/KOREA, *et al.*

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The Federal Maritime Commission's brief in opposition cannot obscure the fact that the Commission has ignored congressionally-imposed restrictions on its power to police international shipping conferences, to the immediate detriment of the conference system and relations of the United States with foreign maritime nations.[1] Unless this Court reviews and reverses the

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[1] Cognizant of this petition, eight foreign nations have as recently as February 20, 1981, once again notified the State Department of their objections to the regulations at issue. *See* Pet. Supp. App. K, *infra*, p. 1a.

Commission's exercise of unauthorized powers, the dissolution of the conferences which Congress sought to avoid—and which has already begun as a direct result of the regulations at issue—will continue with no possibility of effective relief.

1. The Commission acknowledges that the power to compel disclosure of conference self-policing records was denied the agency by Congress in 1961 when it amended Section 15 of the Shipping Act, 46 U.S.C. § 814 (Br. in Opp. p. 13).[2] A proposal to this effect evoked such a "storm of protests"[3] from foreign and domestic carriers, representatives of foreign governments and the Department of State that it was dropped from the final bill for fear of its destructive effect on the cooperative multinational conference system. Yet the Commission continues to urge that because the present regulations do not affirmatively require production of conference self-policing records to the Commission (but instead prohibit the conferences from denying the agency access to such records), they are not inconsistent with Congress's clearly expressed intent. However, the regulations have the same "confidentiality-destroying effect" (Dissent, Pet. App. A, p. 53a), whether they are expressed in the affirmative or double negative. Moreover, the Commission has candidly announced that it intends to implement its regulations to obtain conference self-policing records for use in collateral enforcement of the Shipping Act.[4]

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[2] The Court of Appeals also conceded that such a requirement "clearly would run contrary to the legislative history of the 1961 amendments." (Pet. App. A, p. 38a.)

[3] S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News 3108, 3131.

[4] Pet. App. E, pp. 117a-118a.

This use of the regulations to impose an additional penalty on a carrier already subject to the enforcement action of a conference runs directly contrary to the system of *self*-policing adopted by Congress in Section 15.

Foreign carriers and governments have already responded with alarm to the intrusion of the Commission in the self-policing process which they so vehemently opposed during the 1961 amendment of Section 15. Concern over the regulations has resulted in an exodus of foreign carriers from three shipping conferences.[5] The major foreign maritime nations have repeatedly condemned the regulations as an unwarranted intrusion into the internal affairs of the conferences.[6] A recent decree issued by the President of the Philippines, which prohibits the removal of business documents from Philippine territory without the government's consent on pain of criminal sanctions,[7] points to the growing foreign complications to implementation of the rules. Other carriers are poised to withdraw from the conferences at the first exercise by the Commission of its power to order production of conference records.

The damage to the conference system which Congress struggled to avert has thus begun. The fact that certain conferences have to date complied with the regulations on pain of dissolution by the Commission or to avoid other sanctions under the Shipping Act masks

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[5] *See* Petition of Trans-Pacific Freight Conference of Japan/Korea (hereinafter "Pet."), p. 7 n.5.

[6] *Id.* at 21; Pet. App. J and Supp. App. K.

[7] Pet. Supp. App. L, *infra*, pp. 3a-6a.

the true impact of the regulations which will be felt when actual enforcement of the regulations begins. However, as discussed below, it will by then be too late to undo the damage Congress sought to prevent.

2. Despite the Commission's suggestions to the contrary (Br. in Opp. p. 7), petitioners acknowledge the authority of the Commission to adopt legitimate regulations regarding conference self-policing (Pet. pp. 13-14). However, this undisputed rulemaking power cannot be used to achieve a result contrary to that intended by Congress. And, as even those portions of the legislative history cited by respondents establish,[8] the ability to prescribe self-policing provisions in advance and to compel disclosure of conference self-policing records are among the powers Congress denied the Commission.[9] Respondents nowhere explain how Congress, having deleted these powers from the 1961 amendments, later restored them to the agency.

3. The Commission suggests that evidence of abuses among conference members justifies its adoption of the regulations at issue. However, the agency ignores the fact that it has *not once* exercised its authority under Section 15 to disapprove an agreement based on a conference's failure to adequately police its obligations—an enforcement power which the Commission itself describes as a "weighty sanction" (Br. in Opp. p. 6). The Commission's assertion of unauthorized powers ill becomes an agency which in twenty years has

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[8] See Br. in Opp. pp. 7-11, 13.

[9] See S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3124.

not once implemented those powers Congress clearly allowed it.[10]

4. The only effective means of resolving this important question is through review by this Court. Congress has expressed deep concern that the viability of the conference system not be placed in jeopardy by the Commission's undue interference in conference affairs. The present regulations upset the careful balance between agency enforcement and conference self-regulation that Congress was at pains to achieve when it amended Section 15. To await enforcement action will ensure the very damage—conference dissolutions—that Congress sought to avoid. Furthermore, the Commission itself has argued in the past that, pursuant to the Administrative Orders Review Act, 28 U.S.C. §§ 2341-2353, a timely challenge to its general rules must immediately follow their issuance. *See Outward Continental North Pacific Freight Conference* v. *Fed-*

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[10] The Commission's belief that *Montship Lines, Ltd.* v. *Federal Maritime Board*, 295 F.2d 147 (D.C. Cir. 1961) and *Kerr Steamship Co.* v. *United States*, 284 F.2d 61 (2d Cir. 1960), *vacated per curiam on other grounds*, 369 U.S. 422 (1962), in some way authorize compelled production of documents under Section 15 is simply wrong. These decisions addressed the question whether Federal Maritime Board orders for production of ocean carrier records located outside the United States had been lawfully issued under Section 21 of the Shipping Act, 46 U.S.C. § 820. Congress, in the 1961 amendments to the Act, expressed considerable doubt as to whether such orders could be enforced "in the face of directives not to produce from five friendly maritime nations (Belgium, Italy, Japan, the Netherlands and the United Kingdom)" and explicitly determined not to further "muddy the waters" by attempting to create a similar questionable power under Section 15. S. Rep. No. 860, 87th Cong., 1st Sess., *reprinted in* [1961] U.S. Code Cong. & Ad. News at 3132.

eral Maritime Commission, 385 F.2d 981, 982-83 n. 3 (D.C. Cir. 1967).[11] This case therefore presents the appropriate, and possibly unique, opportunity for review of this critical question concerning the limits on the Commission's authority to invade internal conference affairs.[12]

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[11] Section 4(e) of the Administrative Orders Review Act, 28 U.S.C. § 2344, provides, *inter alia,* that, on entry of a final order of the Commission, an aggrieved party has sixty days to petition to review the order in the appropriate court of appeals. In *Outward Continental, supra,* the Commission contended that conference challenges to the regulations preceding those at issue here were not timely since they were filed more than sixty days after the regulations were issued. While the court did not decide this question, it noted that

> We suggested in *Pacific Coast* that those who have had the opportunity to challenge general rules should not later be heard to complain of their invalidity on grounds fully known to them at the time of issuance.

385 F.2d at 982-83 n.3.

[12] Ironically, the Commission suggests that petitioners present their evidence concerning the destructive effects of the regulations to the agency to ensure that the regulations have not had "the unintended effect of injuring the conference system." (Br. in Opp. pp. 5-6 n.4) This contention is disingenuous, to say the least, in light of the extensive record compiled at the time of the 1961 amendments clearly indicating the disruptions that would result from the agency's exercise of the very same powers it has now assumed. Moreover, to suggest that the conferences are required to submit their grievances to the Commission misses the very point of the 1961 amendments where Congress determined that the agency was not to be judge, jury and policeman with regard to conference self-policing.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX E

AIDE MEMOIRE

The Governments of Denmark, Finland, the Federal Republic of Germany, Japan, the Netherlands, Norway, Sweden and the United Kingdom, ('The Governments') refer to their Aide Memoire of June 27, 1979, concerning General Order No. 7 of the Federal Maritime Commission, issued September 14, 1978, and put into force from January 1, 1979.

As mentioned in the Aide Memoire, the Governments appreciate the importance of eliminating malpractices in the foreign trade and support, in principle, this objective. However, the Governments consider that shipping conferences should, themselves, be responsible for policing their agreements. The regulation authorizing the F.M.C. to have access to self-policing documents, would, contrary to its objective, discourage carrier cooperation with the conference self-policing machinery. Therefore, in the view of the Governments, this would be detrimental to the goal of eliminating malpractices which all the Governments, including the U.S. Government, seek to achieve.

Moreover, the Governments are particularly concerned that the regulation makes available to the F.M.C. documents, including those located abroad, which the self-policing organizations are able to obtain under their arrangements with the conferences and rate agreements.

Taking note of the recently-filed petition for certiorari submitted to the U.S. Supreme Court by the conferences, the Governments wish, at this time, to reaffirm that their position in the matter remains unchanged.

The Governments cordially trust that the U.S. Government will reconsider the matter with a view to eliminating these objectionable features.

Washington, D. C.

20 February, 1981

APPENDIX L

MALACANANG
Manila
PRESIDENTIAL DECREE NO. 1718

PROVIDING FOR INCENTIVES IN THE PURSUIT OF ECONOMIC DEVELOPMENT PROGRAMS BY RESTRICTING THE USE OF DOCUMENTS AND INFORMATION VITAL TO THE NATIONAL INTEREST IN CERTAIN PROCEEDINGS AND PROCESSES.

WHEREAS, the Government promotes, encourages and assists the business sector in its active participation in development programs designed to implement prescribed policies of the State;

WHEREAS, in pursuance of such program and in order to achieve the desired goals and objectives, the Government has authorized certain activities, measures, and undertakings to be done by the private sector; and

WHEREAS, the Government should provide protection to all persons and entities carrying out the economic development programs against the enforcement of certain requirements, orders and judgments of foreign authorities which operate to impose upon this nation their own economic policies, concepts and ideas; perpetuate the economic advantage of the industrial countries over the developing nations; favor foreign competitors; and embarrass, disrupt, or damage business carried on in the country;

NOW, THEREFORE, I, FERDINAND E. MARCOS, President of the Republic of the Philippines, by virtue of the powers vested in me by the Constitution, do hereby order and decree:

SECTION 1. It is hereby declared a policy of the State that any and all documents and information possessed by or in the custody of the Philippine corporations, utilities or individuals doing business in the pursuit of the national

PREVIOUS PAGE WAS BLANK

economic development programs of the Government and/or engaged in the development, promotion, protection and export of Philippine products to increase foreign currency revenues, are vital to the national interest and should not be utilized by any foreign person or government to the prejudice and/or detriment of said corporations, entities or individuals, including their officers and employees.

SEC. 2. To implement this policy, no person shall take or cause to be taken, send or cause to be sent, or remove or caused to be removed from the territorial jurisdiction of the Philippines, or deliver in any manner or form to any foreign person or government or its agent or representative, any document or information as herein defined relating in any manner to any business carried on in the Philippines, unless such taking, sending or removal is consistent with and forms part of a regular practice of furnishing to a head office or parent company or organization outside of the Philippines, or is in connection with a proposed business transactions requiring the furnishing of the document or information, or is required or necessary for negotiations or conclusion of business transactions, or is in compliance with and international agreement, to which the Philippines is a party, or is made pursuant to the authority granted by the designated representative(s) of the President as herein described.

SEC. 3. For the purpose of this Decree, the term "document or information" shall include, but not be limited to, the originals (and all copies which are non-identical whether by means of notation or otherwise) of all written, printed, typed, recorded, graphic, or photographic matter, or any other type of memorial, formal or informal, located in the Philippines (including sound recordings and information stored in computers) whether or not in the possession, custody, or control of the person against whom the foreign requirement, order, direction, or subpoena is directed, including, but not limited to: telexes, records, books of ac-

count, reports, minutes, memoranda, telegrams, diaries, appointment books, log books, desk calendars, notes, inter-office or intra-office communications, bulletins, charts, circulars, maps, expense accounts, working papers, surveys, bid materials, stenographers' notebooks, sales reports, price lists, and all other writing and papers similar to the foregoing, however denominated, including any record or device by means of which material is recorded or stored, and resume, digest or extract of any such material.

SEC. 4. No action for enforcement of any foreign judgment rendered against Philippine corporation, entity or individual shall be entertained or given due course by any Philippine court or administrative body without prior written clearance from the designated representative(s) of the President in any of the following:

a) A judgment for multiple damages or for an amount arrived at by doubling, trebling or otherwise multiplying a sum assessed as compensation for the loss or damage sustained by the person in whose favor judgment is rendered arising out of an alleged anti-trust proceedings;

b) A judgment based on a provision or rule of law which relates to, or is concerned with, the prohibition or regulation of agreements, arrangements or practices designed to restrain, distort or restrict competition in the carrying on of business of any description, or otherwise relates to, or is concerned with, the promotion of competition;

A judgment on a claim for contribution in respect of damages awarded by a judgment falling within paragraph (a) or (b); or

c) Any proceeding in which any of the restricted documents or information has been made the basis of or used in evidence to support the judgment therein.

SEC. 5. Any person who is served or issued any requirement, order, directive or subpoena of any legislative, administrative or judicial authority in any jurisdiction outside of the Philippines involving said documents or information shall inform the designated representative(s) of the President of the Philippines of such service/requirement who shall then determine whether or not compliance shall be made. For this purpose, the President of the Philippines shall promulgate rules, regulations and/or instructions necessary to carry and/or implement the objectives of this Decree.

SEC. 6. Any person who shall violate the provisions of this Decree or any order issued by the President/Prime Minister pursuant to this Decree shall, upon conviction, be punished by imprisonment of not more than three (3) years or a fine of not more than $100,000.00 or both, in the discretion of the court. In case the offender is a corporation, partnership or any juridical entity, the penalty shall be imposed on the officer or officers authorizing, permitting or tolerating the violation.

SEC. 7. All provisions of existing laws, orders, and regulations contrary to or inconsistent with this Decree are hereby repealed or modified accordingly.

SEC. 8. If, for any reason, any section or provision of this Decree is declared to be unconstitutional or invalid, the other sections or provisions of this Decree which are not affected thereby shall continue in full force and effect.

SEC. 9. This Decree shall take effect immediately.

Done in the City of Manila, this 21st day of August, in the year of Our Lord, nineteen hundred and eighty.

(sgd.) FERDINAND E. MARCOS
President of the Philippines